Browning-Ferris Industries of Pennsylvania, Inc. *and* **Edward J. McDeavitt.** Case 6-CA-13801

November 2, 1981

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

On August 12, 1981, Administrative Law Judge William A. Gershuny issued the attached Decision in this proceeding. Thereafter, the Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief in opposition to Respondent's exceptions to the Administrative Law Judge's Decision.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] and conclusions[2] of the Administrative Law Judge and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Browning-Ferris Industries of Pennsylvania, Inc., Carnegie, Pennsylvania, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, except that the attached notice is substituted for that of the Administrative Law Judge.

[1] The Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

[2] In accordance with his dissent in *Olympic Medical Corporation*, 250 NLRB 146 (1980), Member Jenkins would award interest on the backpay due based on the formula set forth therein.

APPENDIX

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

WE WILL NOT interfere with, restrain, and coerce employees in the exercise of the rights guaranteed them under the Act, by discharging them or barring them from our premises or causing their discharge or debarment.

WE WILL make whole Edward McDeavitt, Charles Tully, and Edward Pontius for any loss of earnings they may have suffered as a result of our unlawful conduct of August 24, 1980, with interest.

WE WILL offer Edward McDeavitt, Charles Tully, and Edward Pontius reinstatement to their former or substantially equivalent positions either independently or jointly with one of our brokers or contractors, that employer willing. In the event jobs are not available, we will place these employees on a preferential hiring list at our refuse operations where we employ drivers.

WE WILL give written notice to our trucking brokers and contractors that we have no objection to the employment of these employees or their presence on our premises.

BROWNING-FERRIS INDUSTRIES OF PENNSYLVANIA, INC.

DECISION

STATEMENT OF THE CASE

WILLIAM A. GERSHUNY, Administrative Law Judge: A hearing was held on June 1-2, 1981, in Pittsburgh, Pennsylvania, on complaint issued October 28, 1980, alleging a violation of Section 8(a)(1) of the Act. At issue is (1) whether Respondent, a refuse contractor with the City of Pittsburgh, is a joint employer of drivers employed by independent brokers to operate broker-owned tractors used to haul Respondent's refuse trailers; and (2) whether Respondent discharged or caused to be discharged such drivers in violation of Section 8(a)(1) of the Act.

Upon the entire record, including my observation of witness demeanor, I hereby make the following:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. JURISDICTION

The complaint alleges, Respondent admits, and I find that Respondent, engaged in the hauling of refuse with annual interstate shipments in excess of $50,000, is an employer engaged in commerce within the meaning of the Act.

II. UNFAIR LABOR PRACTICE

Except as specifically discussed below, the relevant facts are not in dispute.

A. *Relationship Between Respondent and Drivers*

Respondent contracts with the city of Pittsburgh to operate a refuse transfer site to which city trucks haul collected refuse, after which it compacts the refuse and hauls it to a landfill area. By law, refuse must be transported to the landfill area within 24 hours. Respondent's failure to comply subjects it to fine and cancellation of the contract. The transfer site is owned by the city, but compaction equipment is owned by Respondent and operated by its employees, who are members of a Teamsters local.

Respondent contracts with independent truckers, commonly referred to in the trade as "brokers" to furnish all tractors and all drivers to haul Respondent's trailers between the transfer station and the landfill area. Pursuant to oral agreements, brokers are compensated on a per load basis, with Respondent additionally providing coveralls for the drivers and coverage under its group medical plan for one driver per tractor. The decision as to which driver receives the coverage is made by the broker. Brokers are required to carry liability insurance and are liable for safety violations related to their tractors. The agreements are terminable at will by either party.

None of the tractors bears any broker identification. The trailers, and many of the coveralls provided by Respondent both to the drivers and to some of its own employees, bear Respondent's logo. The brokers repair their own trucks and purchase them with no financial assistance from Respondent.

Respondent, by posted notice at the transfer station, establishes the starting times, i.e., two shifts beginning at 6 a.m. and 6 p.m., 6 days a week. Generally, Respondent is concerned only that tractors and drivers are available at the transfer station when there is refuse to be handled. The actual scheduling of drivers is done by the brokers, who frequently drive the tractors themselves without regard to shift.

Because brokers are compensated on a per load basis, load logs are maintained both by Respondent's bin loader and the drivers, on forms provided by Respondent. The logs are turned in to Respondent's office, where they are reconciled and copies provided to the brokers. Respondent issues bimonthly checks to the brokers for their services and the latter, in turn, pay the drivers. Neither Respondent nor the brokers withhold for taxes.

Respondent establishes vehicle speed limits at both the transfer station and landfill area and, because the landfill area can be reached only by two narrow public roads, often specifies which of the two roads is to be used by drivers approaching and leaving the area.

At the transfer station, Respondent directs the trucks to specified loading areas and, at the landfill area, directs the trucks to the specific dumping area.

Because Respondent's equipment is costly, it has a requirement for approval of the drivers furnished by the brokers. That approval consists of on-the-job observation by Respondent. If a driver is incompetent, the broker is notified and the driver not permitted on the premises. Similarly, because of its contractual obligation to haul refuse promptly, Respondent "criticizes" drivers who arrive late at the transfer station or leave early.

Additionally, credible testimony of drivers and brokers, unrefuted by Respondent who did not offer testimony in this regard, indicates that Respondent's transfer plant manager, Moersch, on occasion effectively discharged and rehired drivers:

> (a) In July 1980, when driver Tully went home early with the tractor, Moersch said to him, "you can go home permanently . . . yes, I am firing you" and told the broker he wanted another driver and that Tully "no longer was allowed on the property." Several days later, when Tully asked Respondent's Vice-President Curtis for his job back, Curtis stated there was no reason why he could not get his job back. When Moersch was informed, he told Tully to return to work the following day.
>
> (b) In 1977, Moersch "fired" another driver, broker Anderson's son.
>
> (c) On another occasion, when broker Anderson, driving his own tractor, left early, Moersch ordered him to report to his office the next day and there told him that neither the owner-operators nor the drivers were boss at the transfer station, but that he, Moersch, was.
>
> (d) In February 1978, when driver Pontius improperly used a piece of Respondent's equipment to push his tractor and was accused of damaging the equipment, Moersch told broker Dietrich that Pontius was not allowed on the property. Moersch, when asked by Pontius for his job back, told him that he had gotten rid of one of the four bad apples; when told that Respondent's landfill manager Fazio had no objection to Pontius' return as a driver so long as he did not use Respondent's equipment, Moersch told Pontius that it was okay for him to return to work the following Monday.
>
> (e) And, finally, on Sunday evening, August 24, 1980, Moersch telephoned driver Tully at home, telling him that his truck was "fired" and that he should not report in the following morning with the truck; he telephoned broker Anderson's wife at home, telling her that Respondent did not want the Anderson truck anymore and that "Tully's fired;" and he telephoned broker Buzy at home, telling him that driver McDeavitt was no longer allowed on Company property.

Two other incidents further reflect the relations between Respondent and the drivers. In late August 1980, Vice President Curtis asked a driver to erase obscenities from the side of Respondent's trailer, despite the fact that Respondent had responsibility to clean the trailers. And, also in 1980, Respondent's controller, Bright, under emergency conditions where garbage was strewn from an overloaded trailer at a state police station, asked a driver to assist him and other Respondent employees in the cleanup operation. The driver refused, stating that it was not a part of his job.

I conclude, for reasons set forth below, that, at all relevant times herein, Respondent and the independent

trucking brokers were joint employers of those drivers employed by the brokers.[1]

Of course, the fact that the brokers concededly are independent contractors *vis-a-vis* Respondent is not determinative of the issue as to the relationship between Respondent and the brokers' drivers.

Where, as here, there is no contention that the drivers themselves were independent contractors, *Boire* v. *Greyhound Corp.*, 376 U.S. 473, 481 (1964), teaches that the real issue, a factual one, is whether a respondent "possessed sufficient control over the work of the employees to qualify as a joint employer with [the actual employer]." Accord: *N.L.R.B.* v. *Jewel Smokeless Coal Corp.*, 435 F.2d 1270 (4th Cir. 1970).

An examination of the facts in *Greyhound, Jewel Smokeless*, and other cases is instructive in the application of the joint employer test. In *Greyhound*, it was subsequently held that respondent was a joint employer with its cleaning contractor, where Greyhound established work schedules, assigned and supervised cleaners and prompted the discharge of one of the cleaners. 368 F.2d 778 (5th Cir. 1966). In *Jewel Smokeless*, Respondent, a lessor of coal lands, was determined to be a joint employer of miners employed by independent mining contractors, where respondent gave financial assistance in the purchase of equipment, provided engineering and inspection services, furnished workmen's compensation coverage, and terminated union activity by cutting off electric power to the mine to discourage union activity. Similarly in *Hamburg Industries, Fidelity Services, Inc. & Industrial Technical Services, Inc.*, 193 NLRB 67 (1971), the Board found Respondent to be a joint employer of maintenance repair employees provided by a contractor whose sole business was to provide manpower, where Respondent controlled the scope and quality of the work, scheduled the work, and indirectly controlled wages. And in *Mansion House Management Corporation, and Central Parking System of St. Louis, Inc.*, 195 NLRB 250 (1972), respondent was found liable, as a joint employer, for the discharge of security guards employed by a contractor, where it exercised control and direction over the day-to-day activities of the guards and both its employees and guards wore substantially identical uniforms.

On the other hand, where a respondent's control is a consequence of Federal law and regulation, such as is the case with regulated common carriers, a joint employer determination may not be warranted. *N.L.R.B.* v. *Tri-State Transport Corp.*, 649 F.2d 993 (4th Cir. 1981). In the present case, however, the brokers were not certified and there is no evidence or contention that Respondent's control over the drivers was mandated by law.

The evidence, as reviewed above, demonstrates beyond doubt that not only did Respondent effectively discharge and rehire the drivers in a number of instances, it also treated the drivers as its own employees in a number of other respects. In July 1980, Moersch "fired" driver Tully and then rehired him; in 1977, he barred Pontius from the property and later allowed him to return to work; on August 24, 1980, he "fired" McDeavitt and Tully; and on another occasion he told a broker that he, Moersch, and not the brokers or drivers, was the "boss" at the transfer station. Moreover, it is significant that at no time did Respondent attempt to insure safe and dependable driver performance by calling upon the brokers to take corrective action. Moersch in fact considered himself as the drivers' supervisor and, on a day-to-day basis, exercised that authority without regard to (and without objection from) the brokers.

Respondent also held out the drivers as its own employees by providing them with coveralls bearing the company logo and by providing medical insurance to certain of the drivers under its own group plan. And, finally, it established the hours of employment for the drivers, as opposed to simply requiring, under the contract, 24-hour service from the brokers.

B. *The Drivers' Concerted Activities*

In early August 1980, drivers Tully, McDeavitt, and Pontius talked among themselves and with other drivers about increased wages and benefits. Over the years, numerous conversations with other drivers concerning working conditions had been held. The drivers are not represented by a union. These conversations were informal and occurred while the drivers were waiting around the transfer station and landfill area. While there was no effort to conceal either the fact or the subject matter of the conversations, rarely was there present an employee of Respondent in the vicinity. Even then, noisy machinery was in operation, making it most unlikely that the conversations were overheard.

On Sunday, August 24, 1980, most of the drivers met at Tully's home to discuss a course of action. Agreed upon was an approach to the brokers for increased wages and benefits and, if the brokers were unable to renegotiate their agreements with Respondent, then a direct approach to Respondent "to see if they could do anything for us" by way of increasing broker compensation under the contract. There was no agreement at that time as to whether the drivers would strike.

The brokers were aware of the scheduled meeting, having been informed by the drivers at least 1 week before. Respondent also had prior knowledge of the meeting. Moersch admitted to contoller Bright that he knew "weeks before" that the drivers were talking of meeting and Vice President Curtis told Bright he also knew of the meeting, because the drivers had come to him for "more money" and he had informed them to "see your brokers."

I find that the drivers did engage in protected concerted activity on and prior to August 24, 1980, and that Respondent had actual knowledge of such activities.

C. *The Alleged Wrongful Terminations*

Within several hours of the drivers' meeting on the afternoon of Sunday, August 24, 1980, Respondent terminated broker Anderson's contract for one truck and reduced broker Buzy's contract from four to three trucks.

[1] At the conclusion of the hearing, counsel for the General Counsel moved to amend the complaint to allege an alternate theory of liability based on Respondent's status as a nonemployer. The motion is granted, but the issue is not addressed in view of the conclusion herein that Respondent is a joint employer.

More specifically, Anderson's two drivers, Tully and Pontius, and Mrs. Anderson were telephoned by Moersch and told that the Anderson truck was "fired" and was not to be brought in the next day because there was no trailer for it to haul. No other reason was given to them for the action. Also that night, Moersch telephoned McDeavitt, one of Buzy's eight drivers, and told him that he was fired and would no longer be permitted on Respondent's property. No reason for the discharge ever was given by Moersch to McDeavitt or broker Buzy.

No other trucks or drivers were affected by Moersch's actions of August 24.

Respondent's controller Bright, the only management witness to testify, stated that, following a demand by the brokers in early August for substantial increases under their agreements, Respondent began negotiating with a new broker for five trucks at the then current per load rate. Other brokers, he said, who were dissatisfied with those rates, could terminate their agreement with Respondent. The new broker, Horse Trucking, contracted with Respondent during the second week of August and, by the end of the month, began operations with three trucks.

Bright testified that Respondent's decisions on August 24, 1980, were made by Operations Manager Pittman and Vice President Curtis and communicated to the affected drivers and brokers by Moersch. The fact that the drivers' meeting occurred only hours before, he stated, was "purely coincidental." Of the four brokers, it was decided to terminate Anderson's contract for one truck, driven by Tully and Pontius, because Respondent was not satisfied with its performance. It was not there when refuse had to be transported and there were outstanding and unsatisfied damage claims against Anderson. Buzy was reduced from four to three trucks because "we had to cut back" in light of a new contract with Horse Trucking. Bright testified that, as a part of the Buzy decision, McDeavitt, one of the "least desirable" of Buzy's "was to go . . . we didn't want him . . . and we asked that when Buzy's truck went down, McDeavitt go with it."

Several days later, when Tully and Anderson asked why the Anderson's truck was fired, Curtis replied "because of obscenities on the side of the trailer" which Tully and Pontius hauled, adding that, in another 4 to 5 months, none of the brokers would be there.

The obscenities referred to consisted of a drawing of Vice President Curtis performing an unnatural sexual act with the brokers and the words, "kill Curtis." While trailers often contained obscenities written by finger in the dust and grime, this obscenity was unique. On Friday, August 22, Curtis had asked Tully and Pontius if they were responsible. Each denied responsibility and Pontius, at Curtis' request, erased the obscenity.

The outstanding damage claims against Anderson consisted of a $560 claim for damage to an out-house and a $500 claim for damage to a gate.

On the basis of the overwhelming record evidence in this case, I find that reasons assigned by Respondent for its August 24 actions are wholly pretextual and that the true reason, and indeed the sole reason, for its termination of one contract and modification of another and its firing of Tully and McDeavitt and its barring of Pontius from company property was to interfere with, thwart, and restrain the exercise by the drivers of their Section 7 right to seek increased wages and benefits. *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1980).

The only drivers affected by Respondent's August 24 actions were the very three who were spearheading the drive for increased wages. Its actions occurred only hours after the drivers' first meeting and only hours before the start of the Monday 6 a.m. starting time. Respondent, despite its purported negotiations with a new contractor, never disclosed either to the other brokers or the drivers that certain cutbacks would be made to make way for the new broker. Bright's testimony as to the new contract was evasive and elusive as to when negotiations had been concluded, the number of trucks to be provided by the new broker and when the broker commenced operations. Accordingly, his testimony cannot be credited. Given the fact that Respondent's contract with the city was subject to cancellation if garbage were permitted to accumulate, it is unlikely that Respondent would have precipitously terminated its existing contracts before the new broker was in operation. In addition, Respondent refused to give any reason on Sunday for its actions; its subsequently advanced reason having to do with the unreliability of the Anderson truck (and its drivers, Tully and Pontius) had not been raised prior to the hearing; its unsatisfied property damage claims against broker Anderson were not of recent vintage and Anderson had not been pressed to satisfy them; the reason stated by Curtis the following day, i.e., obscenities on the trailer, had not been expressed by Moersch and, in any event, Respondent had not indicated it would be a cause for discharge and cancellation of contract; and its decision to bar McDeavitt as the "least desirable" of Buzy's eight drivers is unsupported by any credible evidence that McDeavitt was less reliable and less safe than the other seven drivers.

I conclude that Respondent, in discharging Tully, Pontius, and McDeavitt and/or barring them from the premises on August 24, 1980, violated Section 8(a)(1) of the Act.

III. REMEDY

Counsel for the General Counsel seeks an order requiring Respondent to cease and desist from engaging in the unlawful conduct, to post an appropriate notice and to notify its current brokers that it has no objection to the employment of Tully, Pontius, and McDeavitt. He seeks also an order requiring backpay and interest to run until (a) a broker offers a driver the same or substantially equivalent position, (b) Respondent offers such to the driver, or (c) a driver obtains substantially equivalent employment elsewhere. And, finally, he seeks an order requiring Respondent to offer broker Anderson a new contract, similar to the one terminated on August 24, 1980, for one truck.

Where, as here, a joint employer unlawfully discharges or causes the discharge of an employee it is appropriate to direct reinstatement by Respondent independently or

jointly with an existing broker, *Jewell Smokeless Coal Corporation*, 175 NLRB 57 (1969), or, in the event jobs are not available, to place the employee on a preferential hiring list at its operations where it is an employer of drivers. It is also appropriate to direct that Respondent notify brokers that it has no objection to their employment of the drivers[2] and to direct backpay and interest in accordance with *F. W. Woolworth Company*, 90 NLRB 289 (1950), *Florida Steel Corporation*, 231 NLRB 651 (1977), and *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

It is inappropriate, however, to compel restoration of the Anderson contract for a number of reasons. First, Anderson admittedly was at all relevant times an independent contractor. Second, Anderson was not alleged in the complaint to be a discriminatee and was not joined as a party to this proceeding. Third, neither the Act nor its legislative history suggests the existence of Board jurisdiction over the contractual relationship of employers subject to the Act and their independent contractors or the terms of such contracts. Fourth, the original agreements with Anderson and the other brokers were oral and terminable by either party at will. And fifth, restoration of the contract is unnecessary to effectuate the purposes of the Act under the circumstances of this case.

Upon the foregoing findings of fact, conclusions of law and the entire record and, pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[3]

The Respondent, Browning-Ferris Industries of Pennsylvania, Inc., Carnegie, Pennsylvania, its officers, agents, successors, and assigns, shall:

1. Cease and desist from interfering with, restraining, and coercing employees in the exercise of their rights under Section 7 of the Act, by discharging them or barring them from the premises or causing their discharge or debarment.

2. Take the following affirmative action designed to effectuate the policies of the Act:

(a) Make whole Edward McDeavitt, Charles Tully, and Edward Pontius for any loss of earnings they may have suffered by reason of Respondent's unlawful activities, to be determined and computed in the manner set forth in the Decision and Order and to run until (a) the same or substantially equivalent position is offered them by Respondent or one of its brokers or contractors or (b) a driver obtains substantially equivalent employment elsewhere.

(b) Offer the above-named employees reinstatement to their former or substantially equivalent positions either independently or jointly with one of its brokers or contractors, that employer willing. In the event jobs are not available, Respondent shall place those employees on a preferential hiring list at its refuse operations where it is an employer of drivers.

(c) Give written notice to its trucking brokers and contractors that it has no objection to the employment of the above-named employees or their presence on Respondent's promises.

(d) Post at its principal office and at its offices at the refuse transfer station and the landfill area involved in this case copies of the attached notice marked "Appendix."[4] Copies of said notice on forms provided by the Regional Director for Region 6, shall, after having been signed by Respondent's representative, be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered with other material.

(e) Notify the Regional Director for Region 6, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

[2] Indeed, Pontius already has been employed by another of Respondent's brokers. For this reason, Respondent's contention that Tully and Pontius, as drivers of the trailer with the obscenities written on its side, are not entitled to reinstatement is without merit. Respondent, by its actions, has announced that their reinstatement would not be inconsistent with a current employer-employee relationship.

[3] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

[4] In the event that this Order is enforced by a Judgment of a United States court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing and Order of the National Labor Relations Board.